(1)

Supreme Court, U.S.
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No. 06- 06-331 SEP 5 - 2006

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IN THE

Supreme Court of the United States

LANCE WISE and NANCY WISE,

Petitioners,

v.

WACHOVIA SECURITIES, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Seventh Circuit affirmed the District Court's dismissal of a lawsuit challenging the involuntary contractual arbitration panel's (NSAD) grant of summary judgment to Wachovia without a scintilla of evidence to support the decision. The questions presented are:

1. Does an National Association of Security Dealers arbitration panel have authority to dispense with the contractually required arbitration hearing and arbitrarily grant Wachovia summary Judgment. 9 U.S.C.A. § 10(a)(4).

2. Does an National Association of Security Dealers Arbitration panel have to apply any recognized standards in the grant of Summary Judgment to a Security Dealer or can they just *willy nilly* grant Wachovia Summary Judgment without any evidence to support the decision. 9 U.S.C.A. § 10(a)(4) (*see* page __ of Seventh Circuit Court of Appeal Decision).

3. Does the fact that an arbitration has only before it the affidavit of the petitioner (Lance Wise) and the findings of the California Office of Corporations and not a scintilla of evidence supporting the contentions of the respondent bar the arbitration panel from granting summary judgment to Wachovia.

4. Is it corrupt or misconduct pursuant to 9 U.S.C.A. § 10 for arbitrators of the National Association of Security Dealers to grant Summary Judgment to a member and against a customer consumer when the only evidence before it is that a Wachovia employed fiduciary investment advisor solicited an investment

from a Wachovia customer, misrepresented the investment, and misled the consumer/customer in and during the course of the said investment advisor's employment.

5. Is it corrupt and misconduct pursuant to 9 U.S.C.A. § 10 for an arbitration panel to assume, imply, or otherwise conjure evidence in granting a Motion for Summary Judgment.

6. Is it a denial of *equal protection of the law* for the Federal Courts to abdicate and delegate their Constitutional mandate of protecting the Rights, Privileges and Immunities of Citizens in favor of 'forced' arbitration panels.

7. While an arbitration panel is not held to the strict rules that are mandated for a Court to follow in reaching a decision, is review by the Court pursuant to 9 U.S.C.A. § 10 so benign as to allow an arbitration panel to render Summary Judgment even though the Court admits that:

> **"the only evidence before the arbitrators was Mr. Wise's affidavit"**

and that affidavit gave no comfort to the decision of either the arbitrators, the affirmation of the District Court or the affirmation 7th Circuit Court of appeals[1].

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1. Lance Wise is strongly suggesting that clairvoyance cannot be a basis for an National Association of Security Dealers award of Summary Judgment, or that the suggested fact that one or more of the National Association of Security Dealers might have the qualification of a medium does not obviate the responsibility of the Court pursuant to 9 U.S.C.A. § 10 to vacate a Summary Judgment entered by the National Association of Security dealers against the appellant upon admittedly no evidence whatsoever.

PARTIES

The petitioner Lance Wise respectfully petitions for a writ of certiorari to review the judgment of the Seventh Circuit of Appeals.

The parties are listed in the caption. This appeal is by the Lance Wise and Nancy Wise from the decision of the Seventh Circuit Court of Appeals. The only remaining defendant/appellee is Wachovia Securities. Wachovia is a corporation, the Wises are individuals who reside in the said Seventh Circuit.

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Appendix A. Opinion of the United States Court of Appeals for the Seventh Circuit Court of Appeals

Appendix B. Decision of the United States District Court for the Northern District of Illinois.

JURISDICTIONAL HISTORY

On August 15, 2002 after the Mr. Winters, who at all times relevant had been a Wachovia employee (investment advisor) had been revealed to be a 'charlatan,' lost all the money he solicited, filed for Bankruptcy and the investment that he had solicited had been lost, make application pursuant to the Wachovia brokerage contract for arbitration. On October 15, 2005 the arbitration panel granted Summary Judgment to Wachovia. On January 14, 2005 Wise made application to the United States District Court.

The District Court granted Summary Judgment to Wachovia on May 4, 2005. The unsuccessful appeal to the Seventh Circuit Court was concluded on June 7, 2006, and rehearing was denied on July 6, 2006.

STATUTE INVOLVED

> **(a)** In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

> **(1)** where the award was procured by corruption, fraud, or undue means;
>
> **(2)** where there was evident partiality or corruption in the arbitrators, or either of them;
>
> **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> **(4)** where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A. § 10.

STATEMENT OF THE CASE

Lance Wise (and his wife Nancy) were initially customers of First Union, which suosequently by a series of mesne mergers became Wachovia. (Contrary to the assumption made by the Seventh Circuit Court of Appeals in their decision, Wise still maintains the Wachovia account). Wise, as do all persons who have a desire to invest in the 'market' signed a brokerage agreement which in words and phrases imposed an arbitration of disputes agreement upon the independent investor. The arbitrator chosen by Wachovia was the National

Association of Security Dealers. *As with all investors Wise had no choice or input as to the arbitrator if he desired to 'trade' securities.* [He did have a choice of individual arbitrators to the extent that one can pick from a list of names submitted to him]

One of the account advisors employed by Wachovia, at all times relevant was Mr. Scott Winters. Mr. Winters, while an employee of Wachovia commencing in **March 2000**, (Complaint exhibit 1 par 2) offered for sale securities in the form a limited partnership interest of Titan Fund 1.LP. Mr. Winters (while a Wachovia employee and using the facilities of Wachovia) represented to investors and in particular Mr. Wise:

> **"this fund had millions of dollars, including $2,000,000 of Mr. Winters' own money; in fact the fund only had around $800,000, none of which belonged to Mr. Winters:***"**

(*See* California Desist Order).

Winters and Wachovia did not disclose at the time of the solicitation that this was a non-Wachovia investment. At all times relevant Winters used Wachovia telephones and facilities in his solicitation. (Wachovia filed no affidavit to contest the averments made by Wise]

"Mr. Winters resigned from Wachovia on Wednesday, **April 12, 2000**.***" (Complaint, exhibit 2 page 2). In his verified paragraph 5h, Mr. Wise certifies:

> "h. That in March of 2000 Scott Winters called Lance Wise on the telephone at the affiant's place

of business in Chicago, Illinois. The telephone call was received in Chicago. Mr. Winters identified himself as "Scott Winters" and commenced a conversation. During this conversation Mr. Winters stated to the affiant the he had obtained information concerning an investment that he felt it appropriate to advise affiant concerning.**** He further announced that affiant being a 'good account' at Wachovia was one of the few people being offered the opportunity to invest in the said investment. Only Mr. Winters' best customers at First Union (Wachovia) would be offered the opportunity to invest. Mr. Winters then outlined the investment potential, the capitalization and other details concerning the hedge fund investment.

"i. That at no time did Mr. Winters state or otherwise suggest that fund (Titan) that Mr. Winters was offering was not a First Union (Wachovia) Transaction). At all times Lance Wise believe that Mr. Winters was acting as a broker carrying a membership.

"h. That affiant on or about April 10, 2000, several days before the actual termination of Mr. Winters' employment at Wachovia, the affiant made the decision to invest.****

"l. That the affiant and his wife in so relying on the material representations of Wachovia and their agents allowed the position of Mr. Wise at Wachovia to be liquidated on or before April 10, 2000 and transferred by Wachovia.***"

The plaintiffs' investment was reduced in value to zero by the fraud of the now former Wachovia investment advisor, and plaintiff complained in vain to *Wachovia* (Complaint par 6). The plaintiff ultimately applied fc · the imposed arbitration that was imposed by the Wachovia brokerage contract. (Complaint par 7).

Wachovia filed a Motion for Summary Judgment. The arbitration record reveals that Wachovia filed no affidavit, took no depositions, and did not even file verified statements of third parties in contradiction of the Wise affidavit. Thus, all that the panel had before it was the fact that a fiduciary investment advisor in the employ of Wachovia used his employment with Wachovia to defraud Wise and other consumer investors who had the misfortune to be Wachovia customers.

On or about October 15, 2004, after the arbitration panel held a 'short' telephone conference between the lawyers, the arbitration panel arbitrarily granted Wachovia Summary Judgment and dismissed the arbitration claim. (Complaint par 10). *The record reflects that the Wise affidavit stands completely undenied and the California Department of Corporations Cease and Desist order unchallenged.*[2]

Pursuant to 9 U.S.C.A. § 10 Wise filed in the District Court a two-count complaint, one Count being an appeal of the arbitration proceeding and the second count being a claim for Breach of fiduciary relationship and contract. The second

2. Applying the standard of viewing the facts in the light most favorable to the non-moving party (Wise) the panel not only assumed facts not before it, but the Seventh Circuit court of Appeals approved clairvoyance and conjecture as a standard for arbitration panels to grant Summary Judgment.

Count included the NASD and Wachovia as defendants and was based upon the established law of Illinois as recited in *Martindell v. Lake Shore Bank*, 15 Ill. App. 2d 217, 145 N.E.2d 784, Ill. App. 1st Dist. Oct. 21, 1957.[3] Illinois decisions suggest that 'fairness' is an integral portion of every contract. The Federal Courts have given 'lip service' to this concept, to wit:

> "Arbitrator is guided by basic requirement to grant parties fundamentally fair hearing, which requires procedural steps of notice, opportunity to be heard, opportunity to present evidence which is relevant and material, and arbitrators who are not infected with bias." *Prudential Securities, Inc. v. Dalton*, 929 F. Supp. 1411 (N.D. Okl. 1996)

Unfortunately, there is distance between the 'cup and the lip' and the Rule of law has slipped through the cracks.

The Seventh Circuit Court of Appeals recognized that there was not an "atom" of evidence in the record that supported the arbitration decision but nevertheless it to justified the denial of a hearing through the transparent guise of a grant of Summary Judgment sans the record. The relevant portion of the Seventh Circuit Court of Appeal's decision is as follows:

> "Absence of evidence as such is not a statutory – ground and does not fit our narrow concept of "manifest disregard," though it may that of other courts. *See Labor Relations Division v. Teamsters*

3. As it was determined that under Illinois Law the NASD had immunity they were dropped from the appeal. This appeal continues solely against Wachovia.

Local 379, 156 F.3d 13, 20-21 (1st Cir. 1998); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 139 (6th Cir. 1996). But if this were really a no-evidence case, there might be some basis for inferring the presence of one or more of the statutory grounds. Suppose the Wises had presented overwhelming evidence that Wachovia had defrauded them and Wachovia had responded with no evidence, no argument even, but merely a one-word denial: "No." If the arbitrators nevertheless awarded judgment to Wachovia, a court might infer that the arbitrators had had a corrupt motive or at least that they had exceeded the powers granted to them by the arbitration clause.

"The best interpretation of the Wises' substantive claim is as follows: A principal generally is not liable for the wrongdoing of an agent who is acting wholly for himself. But there is an exception if, acting with apparent authority, the agent commits a fraud against a third party who reasonably believed that he was entering into a bona fide transaction with the agent's principal. That is the rule of *Gleason v. Seaboard Air Line Ry.*, 278 U.S. 349, 49 S. Ct. 161, 73 L. Ed. 415 (1929); *see Ackerman v. Northwestern Mutual Life Ins. Co.*, 172 F.3d 467, 471 (7th Cir. 1999); *Hartmann v. Prudential Ins. Co. of America*, 9 F.3d 1207, 1211 (7th Cir. 1993), and the Wises' characterization of the wrong done to them.

"But they may have known that Winters was on a frolic of his own in marketing the Titan Fund to

them, and if they knew this — knew that he was acting beyond the authority granted to him by his employer — they could not have been relying on any appearance of authority when they invested in the fund, and so their theory of liability would collapse. It is true that the only evidence before the arbitrators was Mr. Wise's affidavit, which did not acknowledge that he knew that Winters was not acting for Wachovia. But arbitrators, like judges and jurors, are allowed to use their common sense and background knowledge to draw inferences from what the evidence shows. And from what it omits. The Wises' relationship was with Winters rather than with Wachovia. They had been his customers when he was at Merrill Lynch and when he moved to Wachovia they moved with him. When he decided to leave Wachovia and make his fortune with the Titan Fund (of which he was the sponsor and president), the Wises decided to go with him once again, abandoning Wachovia — or so at least the arbitrators could find without taking leave of their senses. The inference that the Wises were dealing with Winters as principal rather than as agent is reinforced by the curious fact that they closed their account with Wachovia. Ordinarily when an investor decides to change his investments, he directs his broker to replace the securities in his account with other securities-he doesn't close the account. The closing of their account is a further indication that the Wises were indeed leaving Wachovia with Winters. *Wise v. Wachovia Securities, LLC*, 450 F.3d 265, *269 -270 (C.A.7 (Ill.), 2006)

REASONS FOR GRANTING THE PETITION

Alternative Resolution of Disputes unfettered presents the 'chilling specter' of the regression of the Justice System to a point below its lowest common denominator. The basic concept of Right and Wrong is abdicated by the National Securities Dealers Association's decision in favor a Securities Broker granting *Summary Judgment* **on absolutely no evidence to sustain the decision.** The obscene arbitration is further depreciated by the fact that the record contains overwhelming and undenied evidence of the nefariousness of Wachovia by its employee Scott Winters. The concept of an 'investment advisor' being a fiduciary to the consumer is an innocent victim to the abandonment of the standard of 'appropriateness.'[4]

The loss of public confidence is further enhanced when the Federal Court system condones the shifting of the Summary Judgment burden from the moving party to the non-moving party and more seriously appears to abdicate its jurisdiction to an arbitrary and capricious ruling not supported in the record.

This Court in *McMahon vs. Shearson Leman*, 482 U.S. 220, 107 S. Ct. 2332 and *Wilki vs. Swan*, 346 U.S. 427, 74 S. Ct. 182, 97 L. Ed. 168 laid the groundwork for the overburdened Courts to sidestep purely routine and technical

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4. When the controversy concerning the appropriateness of the 'TEN COMMANDMENTS' being displayed in the Court house, is disclosed, lay people are heard to say:

> **"the Ten Commandments have no place in the Courthouse — they create a hostile work environment for the lawyers and judges."**

disputes in an efficient manner, but consistent with Newtonian principles every action has an equal and opposite reaction. The instant case hopefully is an anomaly. However, without this Court's setting some firm standards and rules for addressing the denial of Equal Protection of the Law that is so tempting to forced arbitrations conducted by the imposing party's 'related' entity the confidence in the judicial process is diminished substantially.

Public confidence is lost when the large securities brokerage is allowed send its 'securities advisors' into the streets to solicit investments, and then the very same Wachovia type securities dealers are allowed to sidestep responsibility for the resultant fraud of their fiduciary investment advisors.

The 'star chamber' arbitration proceeding is common place when 9 U.S.C.A. § 10 is read in the most procrustean manner and corruption is defined so as to legitimatize 'corruption'. As a practical manner, the average investor, including Wise, has no practical way to ascertain who, if anyone, a particular arbitrator is, or what is his bias. Indeed, unless the investor has the resources of a government not only is the arbitration process a venture into 'darkness' but blind chance. When the dominant contractor (Wachovia) can designate the arbitration group, i.e. the National Association of Securities dealer, rather than a non-related and less dependent group (such as the American Arbitration Association) the potential for abuse is even greater.

In an effort to provide the Federal Courts with a 'stick' to police this potential 'mine field' of temptation Congress enacted 9 U.S.C.A. § 10. **Congress did not intend to provide an Appellate process for arbitration disputes, it**

simply intended to address the most egregious situations such as the Wise case represents. This remedial legislation and the intent of Congress has been de-clawed in the Federal Court decisions herein. The Seventh Circuit Court stated in part:

> "****It is true that the only evidence before the arbitrators was Mr. Wise's affidavit, which did not acknowledge that he knew that Winters was not acting for Wachovia. *But arbitrators, like judges and jurors, are allowed to use their common sense and background knowledge to draw inferences from what the evidence shows. And from what it omits.*****"

(Emphasis added).

It is an axiom of universal acceptance even in arbitration proceedings that *Summary Judgment is an extreme remedy and the burden is upon Wachovia not Wise.* The judges and jurors are *not* delegated the right to use their common sense and background to draw inferences from the evidence omitted. The words setting forth the criterion to applied are '*taking the evidence in the light most favorable to the non-moving party, there are no disputed fact issues.*' The Seventh Circuit would apply the criterion for granting Summary Judgment in the harshest form to the District Court proceeding, but in an arbitration proceeding the criterion is relaxed so as to render it a nullity.[5]

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5. Not every circuit has agreed to be rendered impotent. The beauty of American Jurisprudence is that ultimately the Court exhibit courage and the overwhelming decisions are four square favoring fairness and an abhorrence of relinquishing the Constitutional jurisdiction to protect the citizen consumer.

In the instant case at page 269 (*Wise v. Wachovia Securities, LLC*, 450 F.3d 265, *269 (C.A.7 (Ill.), 2006) The court pointed out the problem and the chilling concern that renders viability to this Petition, to wit:

> "Absence of evidence as such is not a statutory ground and does not fit our narrow concept of "manifest disregard," though it may that of other courts. See *Labor Relations Division v. Teamsters Local 379*, 156 F.3d 13, 20-21 (1st Cir. 1998); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 139 (6th Cir. 1996).

In *Labor Relations Division v. Teamsters Local 379*, 156 F.3d 13, 20-21 (1st Cir. 1998); the Court reversed an arbitrators decision and refused to abdicate its responsibility. The Circuit Courts have struggled to determine what to do with apparent bias and unfairness that they would not tolerate in the District Courts and the arbitrary arbitration. In *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, *1358 (C.A.6 (Mich.), 1989) the Court remarked:

> "This court has indicated that an arbitration decision could be vacated if the arbitrators had a "demonstrated bias," although we have not attempted to formulate a standard to decide such challenges. *See Morris v. Werner-Continental, Inc.*, 466 F.2d 1185, 1190 (6th Cir. 1972), *cert. denied*, 411 U.S. 965, 93 S. Ct. 2144, 36 L. Ed. 2d 685 (1973). The district court therefore looked to the Arbitration Act for guidance, *see supra note 9*, and adopted the provision permitting an arbitration award to be vacated for "**evident partiality**" of the arbitrators. 9 U.S.C. § 10(b);

cf. General Telephone Co. v. Communication Workers of America, 648 F.2d 452 (6th Cir. 1981) (adopting 9 U.S.C. § 10 as standard to review arbitration awards in labor cases). Moreover, the district court adopted the standard announced by the Second Circuit in *Morelite Const. Corp. v. New York City District Council Carpenters Benefit Fund*, 748 F.2d 79 (2d Cir. 1984), in which the court stated that evident partiality "**will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.**" *Id.* at 84; *accord Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095*, 834 F.2d 751, 755-56 (9th Cir. 1987), *cert. denied*, 486 U.S. 1043, 108 S. Ct. 2036, 100 L. Ed. 2d 620 (1988). In arriving at this conclusion, the Second Circuit expressly rejected the lesser standard of an "appearance of bias" and the more exacting standard of "proof of actual bias" to justify invalidating the arbitrators' award.[FN19] We agree with the *Morelite* court's analysis; accordingly, to invalidate an arbitration award on the grounds of bias, the challenging party must show that "a reasonable person would have to conclude that an arbitrator was partial" to the other party to the arbitration. *See also Sheet Metal Workers Int'l Ass'n Local 420 v. Kinney Air Conditioning*, 756 F.2d 742, 745-46 (9th Cir. 1985) (appearance of impropriety insufficient; "a reasonable impression of partiality" required); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681-82 (7th Cir.) *("circumstances must be powerfully suggestive of bias")*, *cert. denied*, 464 U.S. 1009, 104 S. Ct. 529, 78 L. Ed. 2d 711 (1983).

Apperson v. Fleet Carrier Corp., 879 F.2d 1344, *1358 (C.A.6 (Mich.), 1989)

In *Brown vs. Raushcher Pierce*, 994 F.2d 775 the Circuit Court of Appeals recognized that the United States Courts cannot have their jurisdiction taken away from them when obvious injustice such as occurred herein has occurred, to wit:

> "we have recognized two additional non-statutory bases upon which an arbitration award may be vacated. First, an arbitration award may be vacated if it is arbitrary and capricious. *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 507 U.S. 915, 113 S. Ct. 1269, 122 L. Ed. 2d 665 (1993); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990); *United States Postal Serv. v. National Ass'n of Letter Carriers*, 847 F.2d 775, 778 (11th Cir. 1988). Second, an arbitration award may be vacated if enforcement of the award is contrary to public policy. *Delta Air Lines, Inc. v. Airline Pilots Ass'n*, 861 F.2d 665, 671 (11th Cir. 1988), *cert. denied*, 493 U.S. 871, 110 S. Ct. 201, 107 L. Ed. 2d 154 (1989); *U.S. Postal Service*, 847 F.2d at 777.FN3"

thus, there is a conflict amongst the Circuit court that this Court must resolve, to wit: Are the United States Federal Courts pursuant to 9 U.S.C.A. § 10 rubber stamps in the face of arbitrary and capricious awards based upon no evidence, or violations of public policy that allow a Security dealer (Wachovia) to designate the a favored arbitrator to render a summary judgment in which the movant presents no evidence to support his decision, assumes no burden to present evidence and demonstrates no undisputed fact issues — the favored arbitrator claims clairvoyance.

CONCLUSION

Lance Wise and Nancy Wise respectfully request this Court to grant their petition for Certiorari

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JUNE 7, 2006

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-2640

LANCE WISE and NANCY WISE,

Plaintiffs-Appellants,

v.

WACHOVIA SECURITIES, LLC, and NASD,

Defendants-Appellees.

Argued Feb. 10, 2006.
Decided June 7, 2006.
Rehearing Denied July 6, 2006.

Before POSNER, RIPPLE, and KANNE, Circuit Judges.

POSNER, Circuit Judge.

Lance and Nancy Wise appeal from the district court's refusal to set aside a decision by a panel of arbitrators that denied them relief. Before proceeding to the merits, we must consider a jurisdictional question mishandled by the parties and the district court. The jurisdictional statement in the plaintiffs' brief bases federal jurisdiction on the Federal

Arbitration Act, period. But the Act (9 U.S.C. §§ 1 *et seq.*) confers federal jurisdiction in cases involving arbitration only of disputes that, were they litigated rather than arbitrated, would be within federal jurisdiction. 9 U.S.C. § 4; *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 26 n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 384 F.3d 901, 904-05 (7th Cir.2004). The only possible such jurisdictional ground in this case would be diversity of citizenship, and the plaintiffs' jurisdictional statement says nothing about the citizenship of any of the parties. The defendants' statement correctly notes that the basis of jurisdiction must be found outside the Federal Arbitration Act, and asserts that the basis here is diversity. But in violation of 7th Cir. R. 28, the statement does not indicate the citizenship of any of the parties; it merely asserts that they are citizens of different states. Rule 28(a)(1) requires in a diversity suit that the jurisdictional statement name the states of which the parties are citizens. The plaintiffs' reply brief does not mention jurisdiction.

The parties' insouciance about jurisdiction, besides being unprofessional, is particularly disturbing because the defendants are not standard business corporations, and any lawyer who practices in federal court should realize that ascertaining the citizenship of other artificial persons can be tricky. The NASD (formerly called the National Association of Securities Dealers) is a membership corporation-a corporation, ordinarily a nonprofit, that has members but not stock. Wachovia Securities is a limited liability company.

Appendix A

Because the overriding goal in crafting a jurisdictional rule is simplicity, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988), the courts have held that all corporations are to be treated alike for diversity purposes: all are citizens both of the state of incorporation and the state in which the corporation has its principal place of business. *Hoagland ex rel. Midwest Transit, Inc. v. Sandberg*, 385 F.3d 737, 738-39 (7th Cir.2004); *Kuntz v. Lamar Corp.*, 385 F.3d 1177, 1183 (9th Cir.2004); *Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc.*, 710 F.2d 87, 89 (2d Cir.1983). In the case of the NASD those states are Delaware and Washington, D.C. The citizenship for diversity purposes of a limited liability company, however, despite the resemblance of such a company to a corporation (the hallmark of both being limited liability), is the citizenship of each of its members. *Commonwealth Ins. Co. v. Titan Tire Corp.*, 398 F.3d 879, 881 n. 1 (7th Cir.2004); *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691, 692 (7th Cir.2003); *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020, 1021-22 (11th Cir.2004); *Handelsman v. Bedford Village Associates Limited Partnership*, 213 F.3d 48, 51-52 (2d Cir.2000); see also *Carden v. Arkoma Associates*, 494 U.S. 185, 192-96, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990). Wachovia Securities, LLC, it turns out, is owned by another limited liability company, which is owned in turn by two affiliated corporations one of which is a citizen of North Carolina and the other a citizen of New Jersey. The plaintiffs, we have learned, are citizens of Illinois. So there is the required diversity of citizenship, and we can proceed to the merits.

Appendix A

The Wises had become customers of an investment adviser named Scott Winters when he was employed by Merrill Lynch. Winters left Merrill for Wachovia and the Wises went with him, opening an account with Wachovia and agreeing to arbitrate under rules of the NASD any dispute arising from their dealings with the firm. In March 2000 Winters recommended that the Wises invest in a new investment fund called the "Titan Fund." He told them he'd invested $2 million of his own money in Titan. On April 10 the Wises directed Winters to convert the holdings in their Wachovia account to cash. He did this, and three days later the Wises closed the account, which now had $135,000 in cash in it, and wired all the money to Titan. Winters had quit Wachovia the day before the Wises wired the money to Titan.

Months later the Wises discovered that the Titan Fund was a sham and their entire investment lost. Securities regulators in California, where Winters lived, later ordered him to stop acting as an investment adviser in that state. The order was based on findings that he had made misrepresentations in marketing the Titan Fund; for example, his own investment in the fund had been not $2 million, but zero.

The Wises complained to Wachovia, contending that the firm was responsible for Winters' fraud because he had hatched it before he resigned from the firm. They claimed to have had no idea that the Titan Fund had not been recommended by Wachovia-no idea that Winters had been on a frolic of his own in persuading them to invest in Titan.

Appendix A

Their complaint, rejected by Wachovia, was referred to arbitration pursuant to their contract with the firm. At the conclusion of discovery in the arbitration, Mr. Wise submitted an affidavit reciting the facts summarized above. He attached documents relating to his ill-starred investment in the Titan Fund. Wachovia submitted no evidence but moved for summary judgment, which the panel of arbitrators granted without explaining the basis of their decision. Arbitrators have, however, no duty to explain. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204 n. 4, 76 S.Ct. 273, 100 L.Ed. 199 (1956).

The Federal Arbitration Act lists the following grounds for setting aside an arbitral award (an arbitral decision is called an "award" whether or not it awards anything to the complainant).

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). The Wises argue that there was not even an atom of evidence to support summary judgment for Wachovia. The argument might seem to invoke the provision in section 10(a)(3) that authorizes vacating an award for "refusing to hear evidence pertinent and material to the controversy," but the arbitrators did not limit the Wises' presentation of evidence. The Wises further argue that since there was no evidence to support the award, the award must be set aside as being "arbitrary and capricious." But "arbitrary and capricious" is not among the listed grounds for setting aside an award. *Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry.*, 768 F.2d 914, 921 (7th Cir.1985); see also *National Wrecking Co. v. International Brotherhood of Teamsters, Local 731*, 990 F.2d 957, 961 (7th Cir.1993). And although courts will also set aside arbitration awards that are in "manifest disregard of the law," e.g., *id.*, and this is often described as a nonstatutory ground, e.g., *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460-61 (11th Cir.1997); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir.1997), we have defined "manifest disregard of the law" so narrowly that it fits comfortably under the first clause of the fourth statutory ground-"where the arbitrators exceeded their powers." Cf. *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1059-60 (9th Cir.1991); Ian R. Macneil et al., *Federal Arbitration Law* § 40.1.3.2 (3d ed.1999). For we have confined it to cases in which arbitrators "direct the parties to violate the law." *George Watts & Son*, Inc. v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir.2001); see also *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 650 (7th Cir.2001). Obviously this is not such a case.

Appendix A

It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir.1994). When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.-conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration, which unlike the one in this case is concerned with interpreting a contract, the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, e.g., *Tice v. American Airlines, Inc.*, 373 F.3d 851, 854 (7th Cir.2004); *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1194-95 (7th Cir.1987); *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir.2003), for only then were they exceeding the authority granted to them by the contract's arbitration clause.

Reluctantly driven back to the statutory grounds for setting aside the arbitrators' award, the Wises ask us to infer corruption, partiality, exceeding granted authority, etc., from the absence of any evidence to support the arbitrators' award. Absence of evidence as such is not a statutory ground and does not fit our narrow concept of "manifest disregard," though it may that of other courts. See *Labor Relations Division v. Teamsters Local 379*, 156 F.3d 13, 20-21 (1st Cir.1998); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 139 (6th Cir.1996). But if this were really a no-evidence

case, there might be some basis for inferring the presence of one or more of the statutory grounds. Suppose the Wises had presented overwhelming evidence that Wachovia had defrauded them and Wachovia had responded with no evidence, no argument even, but merely a one-word denial: "No." If the arbitrators nevertheless awarded judgment to Wachovia, a court might infer that the arbitrators had had a corrupt motive or at least that they had exceeded the powers granted to them by the arbitration clause.

The best interpretation of the Wises' substantive claim is as follows: A principal generally is not liable for the wrongdoing of an agent who is acting wholly for himself. But there is an exception if, acting with apparent authority, the agent commits a fraud against a third party who reasonably believed that he was entering into a bona fide transaction with the agent's principal. That is the rule of *Gleason v. Seaboard Air Line Ry.*, 278 U.S. 349, 49 S.Ct. 161, 73 L.Ed. 415 (1929); see *Ackerman v. Northwestern Mutual Life Ins. Co.*, 172 F.3d 467, 471 (7th Cir.1999); *Hartmann v. Prudential Ins. Co. of America*, 9 F.3d 1207, 1211 (7th Cir.1993), and the Wises' characterization of the wrong done to them.

But they may have known that Winters was on a frolic of his own in marketing the Titan Fund to them, and if they knew this — knew that he was acting beyond the authority granted to him by his employer — they could not have been relying on any appearance of authority when they invested in the fund, and so their theory of liability would collapse. It is true that the only evidence before the arbitrators was Mr. Wise's affidavit, which did not acknowledge that he knew

that Winters was not acting for Wachovia. But arbitrators, like judges and jurors, are allowed to use their common sense and background knowledge to draw inferences from what the evidence shows. And from what it omits. The Wises' relationship was with Winters rather than with Wachovia. They had been his customers when he was at Merrill Lynch and when he moved to Wachovia they moved with him. When he decided to leave Wachovia and make his fortune with the Titan Fund (of which he was the sponsor and president), the Wises decided to go with him once again, abandoning Wachovia-or so at least the arbitrators could find without taking leave of their senses. The inference that the Wises were dealing with Winters as principal rather than as agent is reinforced by the curious fact that they closed their account with Wachovia. Ordinarily when an investor decides to change his investments, he directs his broker to replace the securities in his account with other securities-he doesn't close the account. The closing of their account is a further indication that the Wises were indeed leaving Wachovia with Winters.

Affirmed.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 4, 2005

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 04 C 7438

LANCE WISE and NANCY WISE,

Plaintiffs,

v.

WACHOVIA SECURITIES LLC,
NATIONAL ASSOCIATION OF SECURITIES DEALERS,

Defendants.

May 4, 2005

MEMORANDUM OPINION AND ORDER

ANDERSEN, J.

This case is before the court on the motion of defendants Wachovia Securities LLC ("Wachovia") and National Association of Securities Dealers ("NASD") to dismiss the plaintiffs' complaint pursuant to Fed.R.Civ.P. 12(b)(6) and to confirm the arbitration award pursuant to 9 U.S.C. § 9. For the reasons set forth below, we grant the motion to dismiss and confirm the arbitration award.

Appendix B

BACKGROUND

For purposes of this motion, we assume the following facts as true. Plaintiffs Lance and Nancy Wise commenced doing business with Scott Winters ("Winters") during the 1990s when Winters was employed with Merrill Lynch. When Winters became employed by First Union, which later merged with Wachovia, Plaintiffs agreed to and did become a customer of Wachovia. Plaintiffs entered into an agreement with Wachovia whereby Wachovia agreed to provide investment advisory services for the Plaintiffs and the Plaintiffs agreed to submit all disputes to Binding Arbitration conducted by NASD.

In March of 2000, Winters contacted Plaintiffs concerning an investment opportunity, the Titan Fund. Winters represented to Plaintiffs that the investment would be capitalized with at least ten million dollars and that he (Winters) was personally investing $2,000,000 of his own money in the investment. Winters further claimed Plaintiffs had a good account at Wachovia and they were one of the few people being offered this investment opportunity.

On or about April 10, 2000, Plaintiffs decided to invest in this fund. On April 12, 2000 Winters resigned from Wachovia. The following day, April 13, 2000 Lance Wise authorized the liquidation of his account at Wachovia to the Titan Fund. In November of 2000, Plaintiffs discovered the Titan Fund was a sham and they had lost all of their investment. Shortly thereafter, Plaintiffs sought reimbursement from Wachovia for their loss due to Winters' misconduct. Following Wachovia's refusal of reimbursement,

Plaintiffs requested arbitration of the dispute pursuant to their agreement and paid the fees required by the NASD to arbitrate the dispute.

NASD followed its procedures by appointing arbitrators, setting a hearing date and allowing discovery to proceed. During the course of the arbitration proceeding, Wachovia filed a motion for summary judgment. Plaintiffs filed their response, accompanied by the affidavit of Plaintiff Lance Wise. Wachovia then filed its reply. On April 28, 2004, the arbitration panel held a short telephonic hearing on the motion. On October 15, 2004, NASD issued its Award in favor of Wachovia, dismissing Plaintiffs' claims against Wachovia "in their entirety with prejudice."

Plaintiffs filed a two-count complaint in this Court, alleging that the arbitration award should be vacated pursuant 9 U.S.C. § 10 because NASD committed misconduct by granting summary judgment without holding an evidentiary hearing. Plaintiffs further allege that defendant Wachovia induced the decision of the arbitrators, and in doing so, defendants breached Wachovia's fiduciary duty to the Plaintiffs and the covenant of fairness implied in their contract. Defendants have moved to dismiss the complaint and to confirm the arbitration award.

STANDARD OF REVIEW

When reviewing a motion to dismiss, the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Szumny v. Am. Gen. Fin., Inc.*, 246 F.3d 1065, 1067 (7th

Cir.2001). The purpose of a motion to dismiss is to test the sufficiency of the complaint and not to decide the merits of the challenged claims. *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524, (7 Cir.1996). Dismissal is properly granted if it is clear that plaintiff can prove no set of facts to support the allegations set forth in the claim which would entitle her to relief. *Hernandez v. City of Goshen*, 324 F.3d 535, 537 (7 Cir.2003).

DISCUSSION

I. The Federal Arbitration Act Governs This Dispute

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, governs the grounds for vacating an arbitration award. Under § 10 of the FAA, a district court is permitted to vacate an arbitration award if it finds that: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone a hearing, in refusing to hear relevant evidence, or in misbehaving in some other way; or (4) the arbitrators exceeded their powers or imperfectly executed them. 9 U.S.C. § 10(a)(1)-(4) (2003); *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir.2001). "Once a dispute has been resolved through arbitration, the role of the reviewing court is extremely limited." *Sphere Drake Insurance Ltd. v. All American Life Insurance Co.*, 2004 WL 442640, *1, 3 (N.D.Ill.2004). Accordingly, federal courts must extend extraordinary deference to the arbitration panel's decision. *Id.*

Appendix B

A. A Fundamentally Fair Hearing Was Afforded

Plaintiffs argue that NASD engaged in misconduct because the arbitrators granted summary judgment without holding an evidentiary hearing.

The Seventh Circuit has found that arbitrators are not required to conduct a formal evidentiary hearing so long as the proceeding is otherwise fundamentally fair. *Generica Ltd. v. Pharm Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir.1997). In *Generica*, the Seventh Circuit stated that, although an arbitrator is not bound to hear all of the evidence presented by the parties, he is required to give each party an adequate opportunity to present its evidence and arguments. *Id* at 1130. The court found that the arbitrator did not abuse his discretion when he denied to re-open plaintiff's cross-examination of a witness. *Id.* at 1131. The court noted that it is appropriate to vacate an arbitral award when "the exclusion of relevant evidence actually deprived a party of a fair hearing." *Id.* at 1130. However, the court concluded that the arbitrator had ample evidence before him upon which to decide the dispute and thus the arbitral award was upheld *Id.* at 1131.

Other courts have held that an arbitration panel has the authority to dismiss facially deficient claims with prejudice based solely on the parties' pleadings. *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir.2001). In that case, the Tenth Circuit explained that under NASD's procedural rules, an arbitrator may award any relief that would be available in a court of law. *Id.* at 1206. Thus, the court found that the NASD provided the plaintiff with a fundamentally fair proceeding because plaintiff had the opportunity to fully brief and argue

the motions to dismiss. *Id.* at 1207. The court also found that there was no evidence that NASD engaged in misconduct in conducting the arbitration proceeding. *Id*.

This case is similar to *Generica* because, although NASD did not conduct a formal evidentiary hearing, the Plaintiffs received an otherwise fundamentally fair proceeding. The arbitration panel had before it the parties' pleadings, discovery responses, Plaintiff Lance Wise's affidavit and other materials. Furthermore, on April 28, the arbitrators held a telephonic hearing on Wachovia's summary judgment motion.

At the hearing, both parties were afforded an opportunity to present their position. As noted by the court in *Sheldon*, under NASD's procedural rules, an arbitrator may award any relief that would be available in a court of law. *Sheldon*, 269 F.3d at 1206. In this case, Plaintiffs were afforded, at the very least, the same opportunity as a court of law would have provided when a summary judgment motion has been filed.

In this case, Plaintiffs fail to articulate any other evidence they may have presented for consideration at an evidentiary hearing. Therefore, Plaintiffs have not demonstrated that "the exclusion of relevant evidence actually deprived [them] of a fair hearing." *See Generica Ltd.*, 125 F.3d at 1130. Accordingly, we find that Plaintiffs have not, and cannot, allege facts sufficient to establish one or more of the grounds required to set aside an arbitration award pursuant to Section 10 of the Federal Arbitration Act. Therefore, the award is confirmed in accordance with the provisions of Section 9 of the FAA.

Appendix B

CONCLUSION

For the foregoing reasons, NASD and Wachovia's motion to dismiss the complaint is granted. The October 15, 2004 arbitration award is confirmed pursuant to Section 9 of the Federal Arbitration Act. This is a final and appealable order.

It is so ordered.

No. 06-331

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

LANCE WISE and NANCY WISE,

Petitioners,

v.

WACHOVIA SECURITIES, LLC,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Seventh Circuit correctly rejected Petitioners' motion to vacate the arbitration award, which motion was based on Petitioners' contention that the arbitrators were "corrupt" and "guilty of misconduct" as set out by the Federal Arbitration Act, 9 U.S.C. § 10?

CORPORATE DISCLOSURE STATEMENT

The following are either parent corporations of Respondent Wachovia Securities, LLC or own more than 10% of Respondent's stock: Wachovia Securities Financial Holdings, LLC; Wachovia Securities Holdings, LLC; Prudential Securities Group, Inc.; Everen Capital Corporation; Wachovia Corporation; Prudential Capital and Investment Services, Inc.; Pruco, Inc.; and Prudential Financial, Inc.

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Respondent, Wachovia Securities, LLC ("Wachovia"), respectfully requests that this Court deny the petition for a writ of certiorari. In this case, the Seventh Circuit – based on the record presented to the NASD arbitrators and in accord with well-settled law – held that there was a proper basis in the record for the arbitrators to dismiss Petitioners' claims. Contrary to Petitioners' repeated assertions, and as recognized by both the district court and the Seventh Circuit, there was a proper basis for the arbitrators to rule as they did. The holding below is correct and consistent with well-established principles of judicial review of arbitration awards pursuant to the Federal Arbitration Act. It is not necessary for this Court to review that decision. The petition for a writ for certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

This case concerns judicial review of an arbitration award pursuant to 9 U.S.C. § 10 for alleged arbitrator "misconduct." In the arbitration at issue, after considering the exhibits, the parties' briefs, and hearing argument from the parties, the arbitrators dismissed Petitioners' claims against Wachovia. Both the Seventh Circuit and the district court rejected Petitioners' motion to vacate the award.

Petitioners filed the arbitration at issue in August 2002. Petitioners claimed that Wachovia had secondary liability (under theories of respondeat superior or control person liability) for the alleged fraud of Scott Winters, a former Wachovia registered representative, in connection with Petitioners' investment in a private securities offering known as Titan Fund I, L.P. ("Titan Fund"). Documents that *Petitioners* filed with the arbitrators showed that the investments were made *after* Scott Winters had resigned from Wachovia.

After the close of discovery, Wachovia requested that the arbitrators dismiss Petitioners' claims. Wachovia cited two independent grounds upon which dismissal was appropriate. First, based on the undisputed facts, or facts that could not genuinely be in dispute, Petitioners' secondary liability theories could not reach Wachovia. Wachovia briefed controlling law and provided the arbitrators with copies of the cited authorities (*Hauser v. Farrell*, 14 F.3d 1338 (9th Cir. 1994); *Harrison v. Dean Witter Reynolds, Inc.*, 974 F.2d 873 (7th Cir. 1992)).

Second, Petitioners were in continuous violation of the arbitrators' discovery order. On the day of oral argument, Petitioners had been in continuous violation of the order for over five months. Petitioners omit any reference to this second ground for dismissal, despite the fact that it was briefed and before the arbitrators, the district court, and the Seventh Circuit.

Contrary to Petitioners' arguments, the record before the arbitrators was not limited to Lance Wise's affidavit and the California Cease and Desist Order directed to Scott Winters and Titan Fund. Rather, the record included the following, which were attached as exhibits to the briefs filed in the arbitration:

- Titan Fund Investment Documents
    - Petitioners' copy of Private Offering Memorandum
    - Petitioners' copy of Limited Partnership Agreement
    - Subscription Agreement signed by Lance Wise

- Investor questionnaire completed by Lance Wise

- Documents Tracing the Funds Invested

  - Lance Wises' Instructions to Wachovia to transfer $135,000 *away* from his Wachovia account (leaving assets worth $253.51 at month's end) *to* a Titan Fund account at the Bank of Marin *after* Scott Winters had resigned

  - Petitioners' copy of Bank of Marin account statement that showed (i) their wire transfers *to* the Titan Fund account *from* Wachovia *after* Scott Winters had resigned and (ii) their wire transfers *to* the Titan Fund account *from* their non-Wachovia accounts *after* Scott Winters had resigned

- Petitioners' Discovery Responses showing that Lance Wise had been a practicing Certified Public Accountant since 1980

- Lance Wise's NASD record showing the NASD licensing exams that Wise himself had passed

Though Petitioners had ample opportunity on brief and during oral argument, they did not challenge the authenticity of these documents. Lance Wise did not dispute that he signed the Subscription Agreement and completed the investor questionnaire. The documents stood unchallenged. Indeed, Petitioners themselves produced, filed, completed or signed all the documents listed above.

The arbitrators entered a written award dismissing Petitioners' claims. Dissatisfied with the award, Petitioners

filed a "Complaint" in the United States District Court for the Northern District of Illinois. Pursuant to 9 U.S.C. § 10, Petitioners requested the district court to vacate the arbitration award on the sole ground that "the arbitrators [were] guilty of misconduct" in dismissing the claims. (Petitioners' Complaint at 6.) Petitioners attached to their "Complaint" the briefs and exhibits filed in the arbitration. The district court found that the arbitration was a "fundamentally fair proceeding" and that Petitioners "were afforded, at the very least, the same opportunity as a court of law would have provided when a summary judgment motion has been filed." (App. at 15a.) The district court denied Petitioners' request to vacate, and Petitioners appealed. The Seventh Circuit affirmed, holding that there was a proper, "common sense" basis for the arbitrators to find that Petitioners knew they were "abandoning Wachovia" when they made the investments at issue. (App. at 9a.)

THERE IS NO COMPELLING REASON SUPPORTING THE EXERCISE OF THIS COURT'S EXTRAORDINARY JURISDICTION

Petitioners ask this Court to address seven separate questions related to the validity of the review of the arbitration award. None of the seven presents any compelling reason for this Court to use its extraordinary certiorari power to review the Seventh Circuit's decision. All seven are based on the same faulty premise. The faulty premise is Petitioners' assertion that the award was "willy nilly . . . without any evidence to support [it]." (Petition at *i.*) In fact, the arbitrators had before them the exhibits filed by the parties, which included Titan Fund investment documents, documents tracing the funds Petitioners claimed they invested, Petitioners' discovery responses, and Lance Wises' NASD record. Additionally, although neither of the

courts below addressed it, the arbitrators also had the fact of Petitioners' long-standing defiance of their discovery order.[1]

The Petition should be denied for three reasons. First, Petitioners did not raise below issues one through three, six and seven. The court of appeals did not address these issues. Thus, Petitioners did not properly preserve these questions for review here. Second, there is no conflict among the Circuits, or among any other courts, with regard to the specific issue that the court of appeals actually decided and that this case presents. Finally, the decision below is correct. The arbitration was not a "star chamber" proceeding, as alleged. (Petition at 10.)

A. Petitioners Did Not Raise Five of the Seven Points in the District Court or Circuit Court of Appeals and May Not Do So Now.

In Petitioners' brief to the Seventh Circuit, they identified the "statement of the issues presented for appeal" as whether, pursuant to 9 U.S.C. § 10, the arbitrators' award was "corrupt" and whether the district court's decision was "proper." (Petitioners' Seventh Circuit Brief at 1.) In Petitioners' district court Complaint, they alleged the arbitrators were "guilty of misconduct," pursuant to 9 U.S.C. § 10, in dismissing their claims. (Petitioners' Complaint at 6-7.)

Only Petitioners' articulation of issues four and five (Petition at *i-ii*) resemble the issues presented below. With regard to these, Petitioners frame the question as whether, pursuant to 9 U.S.C. § 10 and based on the record before it, the arbitrators' dismissal was "corrupt or misconduct" (issue

[1] Although neither court below reached the issue of Petitioners' discovery violation, Wachovia briefed, and did not waive, the issue. Petitioners' discovery violation alone was sufficient cause for the arbitrators to dismiss the claims.

four) or "corrupt and misconduct" (issue five). (*Id.*) Petitioners did not raise any of the other issues in the courts below and cannot do so now.

This Court does not permit parties to raise new arguments in their petitions for certiorari, and Petitioners' attempt to do just that should be rejected. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."). Having not raised them below, Petitioners should not be permitted now to advance issues one through three, six and seven.

B. There Is No Conflict Among the Courts of Appeal, Or Any Other Courts, on the Fourth and Fifth Questions Presented.

The Seventh Circuit's decision rested on a rejection of the single premise of Petitioners' multiple arguments – namely that there was no basis whatsoever for the award. After the Seventh Circuit identified the Federal Arbitration Act's four statutory grounds for setting aside an arbitral award, the court stated that "*if this were really a no-evidence case*, there might be some basis for inferring the presence of one or more of the statutory grounds." (App. at 7a-8a (emphasis added).)

Noting that "arbitrators, like judges and jurors, are allowed to use their common sense and background knowledge," the Seventh Circuit found that the arbitrators had before them a basis upon which to find that, with respect to the investment at issue, that there were no grounds for imposition of liability under respondeat superior or control person theories. (*Id.* at 9a.) The court found a "common sense" basis for the arbitrators to conclude that Petitioners knew that Titan Fund was not a Wachovia offering and that they were dealing with Scott Winters not Wachovia. (*Id.*)

The Petition does not point to a single opinion that conflicts with the Seventh Circuit's holding that arbitrators may use "their common sense and background knowledge to draw inferences from what the evidence shows. And from what it omits." (App. at 9a.) Further, Petitioners fail to accurately or clearly identify the supposed conflict among the circuit courts regarding judicial review of an arbitral award pursuant to the grounds Petitioners advanced below – "corruption" or "misconduct." Petitioners identify the supposed conflict as follows:

> [T]here is a conflict amongst the Circuit court that this Court must resolve, to wit: Are the United States Federal Courts pursuant to 9 U.S.C.A. § 10 rubber stamps in the face of arbitrary and capricious awards based upon no evidence, or violations of public policy that allow a Security dealer (Wachovia) to designate the a [sic] favored arbitrator to render a summary judgment in which the movant presents no evidence to support his decision, assumes no burden to present evidence and demonstrates no undisputed fact issues – the favored arbitrator claims clairvoyance.

(Petition at 14.) Petitioners fail specifically to identify any supposed conflict involved in this matter.

The cases cited in the Petition do not show a conflict among the circuits on the issue before the Seventh Circuit. The authorities cited in the Petition do not conflict with the Seventh Circuit's decision, which again rested on the determination that there was a "common sense" basis for the arbitrators' to dismiss the claims. (App. at 9a.) The judicial proceedings that followed the arbitration turned on the arbitration record – the pleadings and the exhibits filed by

the parties – not on any point of law on which there is a conflict.

C. The Seventh Circuit Correctly Concluded There Was a Proper Basis for the Award.

There were two independent grounds for the arbitrators to dismiss the claims. First, the exhibits established that Petitioners had notice that Titan Fund was a direct, private offering that had nothing to do with Wachovia. Second, Petitioners continuously violated the arbitrators' discovery order over a period of over five months. They were in violation of the order on the day the arbitrators dismissed their claims. They never complied with the order.

The arbitration record included two key categories of exhibits. First, there were the Titan Fund papers. Second, there were the documents that showed the path of the funds Petitioners claimed they invested in Titan Fund. In the arbitration, in the district court, and in the Seventh Circuit, Petitioners did not dispute the authenticity of the documents, which they produced, filed, completed or signed. Nor did they challenge the disclosures about the Titan Fund (*e.g.*, private offering) or the objective facts established by the documents (*e.g.*, source and timing of their transfers of funds, securities licenses held by Lance Wise).

The first page of the Titan Fund Offering Memorandum stated as follows:

> The Interests are being privately offered and sold by the Partnership [defined as Titan Fund I, L.P.] directly on a best efforts basis pursuant to an exemption from the registration provisions of the Securities Act of 1933 . . . .

The Offering Memorandum stated that it was a "Confidential Private Offering Memorandum." It stated that "No secondary market for the Interests exists, and none is likely to develop." Throughout, the Offering Memorandum referred to the Titan Fund partnership and Titan Securities, LLC. Nowhere did it mention Wachovia. Nowhere did it state that Wachovia had anything to do with the offering. At no time did Petitioners' alleged investments in Titan Fund appear on their Wachovia account statements. At no time did Wachovia send Petitioners a confirmation slip regarding their alleged investments in Titan Fund. All other Titan Fund disclosure documents underscored the fact that Titan Fund was a direct, private offering that had nothing to do with Wachovia. The disclosures in the Titan Fund papers were a proper basis for dismissal.

Likewise, the path of the funds Petitioners claimed they invested was a proper basis for dismissal. These documents established that Petitioners transferred funds (i) from Wachovia to a Bank of Marin account for Titan Fund and (ii) from other financial institutions to this same account.[2] As the Seventh Circuit recognized, the arbitrators, "without taking leave of their senses," had a basis to conclude that Petitioners knew they "were indeed leaving Wachovia with Winters." (App. at 9a.)

Based on any one of these grounds – the disclosures in the Titan Fund papers, the path of the funds claimed to be

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[2] Petitioner Lance Wise's contention that he did not "close" his Wachovia account is outside the record he presented to the district court and is misleading. After his transfer of $135,000 from Wachovia, his account was left, at month's end, with assets valued at $253.51. As the Seventh Circuit noted, Wise did not direct the purchase of new investments in his account but transferred funds away from Wachovia; *in effect* he closed his account. (App. at 9a.) By "closing" his account in this way, the arbitrators reasonably could have concluded that Wise abandoned his relationship with Wachovia. (*Id.*)

invested, or Petitioners' violation of the order – the Seventh Circuit's decision, like the district court's ruling and the arbitrators' award, was correct. After more than four years of first arbitration and then litigation, the resolution of this matter should stand final. There is no compelling reason for the Court to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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